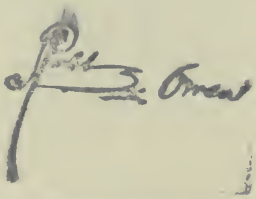

GREAT BRITAIN
AND THE
PANAMA CANAL:

A STUDY OF THE TOLLS QUESTION

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FOREWORD.

This little volume contains the essential parts of a contribution in German to the Jahrbuch des Völkerrechts (Munich), the editors of which have kindly consented to the appearance of this study in English. While the conclusions arrived at recognize very large power in the United States and very much restricted rights in Great Britain as respects the Panama Canal, the writer has endeavored to consider all questions from an objective standpoint — "sachlich", as the Germans expressively say. This has been made the more possible, because the writer, being in a "neutral" land, has at least remained uninfluenced by local sentiment.

HEIDELBERG,
April 10, 1913.

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I.

He deceives himself grievously who believes the United States made the stupendous sacrifice of human energy and public money necessary to build the Panama Canal, "the greatest liberty Man has ever taken with Nature", with any other purpose in view than the national advantage of the United States — commercial and, above all, political advantage. A critical study of the diplomatic history of the various Isthmian Canal projects from 1835 (the Biddle Mission) down to the present time will create no doubt in the mind of any except the most naive that the United States ever had any other intention. Equally clear also is the fact that the United States never thought of selfishly appropriating the canal as a national monopoly. It was to be a great open highway to bring remote nations and peoples into closer relation with one another; it should be dedicated to the commerce of the world as an exalted agency of peace, in the control of a liberty-loving people, for the promotion of human hap-

piness and the spread of the blessings of civilization. Nor is there anything necessarily incompatible in these positions. No one underestimates the benefits to mankind of the Suez Canal because the builders thereof draw a 30% dividend annually.

For the past eight years the American nation had given the best of its brawn and brains and offered up its millions of treasure[1] to the execution of the great plan, that had occupied the dreams of her earliest statesmen; and the people were rejoicing over the dispatch of the work and the prospect of the early realization of the national benefits they expected to receive as a return upon the enormous investment. Accordingly the Congress of the United States, in anticipation of the opening of the canal in the course of the year 1913 and in order to give the shipping interests of the world sufficient time in which to adjust themselves to the far reaching changes in the course of navigation likely to follow the opening of the new waterway, enacted a law (Public No. 337) entitled "An act to provide for the opening, maintenance, protection, and operation of

[1] The present estimate of the cost of the Panama Canal to the amount of which bonds of the United States have been authorized is $ 375,201,000. This is exclusive of the cost of fortifications estimated at $ 30,000,000.

the Panama Canal and the sanitation and government of the Canal Zone". It was approved by President Taft on August 24, 1912, with the comment that he regarded the bill on the whole "to be one of the most beneficial that has passed this or any other Congress".

Seldom has any proposed legislation been the subject of such a thorough and general discussion in the Congress of the United States as this. Aside from the reams in the "Congressional Record" of the debates upon various aspects of the proposed canal act, above all with reference to the tolls questions, several volumes covering hearings before Congressional committees, reports of military, scientific, legal and commercial experts, and so forth, were ordered printed and distributed among the members. The hearings before the House committee alone cover 1127 pages and before the Senate committee nearly a thousand pages. During the consideration of this act, the Clayton-Bulwer treaty, and the Hay-Pauncefote treaty were printed in their entirety and laid upon the desks of the members of Congress, in one document or another, nine different times. During the discussion of the tolls question, and a month before the enactment of any law, the Congress enjoyed the very exceptional benefit of having

communicated to it officially[1] the views of the British government as to some of the legal aspects of granting American ships free passage through the canal.

After the most careful deliberation, and in the consciousness that they were executing a traditional policy and acting scrupulously within the treaty obligations of their country, a Democratic House and a Republican Senate concurred in enacting the following provisions in the said act:

> "Sec. 5. That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal: Provided, that no tolls, when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the President, by proclamation. *No tolls shall be levied upon vessels engaged in the coastwise trade of the United States.* — — — — — — — — — — — — — — Tolls may be based upon gross or net registered tonnage, displacement tonnage or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels

[1] To be exact, on July 12, 1912, the Secretary of State communicated to the chairman of the Committee on Interoceanic Canals in the Senate the substance of the British Government's note of July 8, 1912. This communication was laid before the Senate and is printed in the "Congressional Record" of July 13, 1912, at page 9523.

carrying passengers or cargo. When based upon net registered tonnage for ships of commerce the tolls shall not exceed one dollar and twenty five cents per net registered ton, nor be less, *other than for vessels of the United States and its citizens* than the estimated proportionate cost of the actual maintenance and operation of the canal subject, however, to the provisions of Article 19, of the convention between the United States and the Republic of Panama, entered into November 18, 1903. If the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of one dollar and twenty-five cents per net registered ton as nearly as the same may be determined, nor be less than the equivalent of seventy-five cents per net registered ton. The toll for each passenger shall not be more than one dollar and fifty cents".

Pursuant to the authority vested in the President by this section, President Taft issued a proclamation on November 13, 1912, fixing the rates of tolls to be paid by vessels using the Panama Canal[1]. Under date of November 14, 1912, the British government directed its ambassador in Washington to read to and leave with the Secretary of State an elaborate protest it had prepared[2]

[1] Because of its practical importance and of its bearing upon questions hereinafter discussed, we append this proclamation as an exhibit. To be noted, no tolls whatever are levied for passengers.

[2] This protest was made public December 10, 1912. It was issued in London as a Parliamentary Paper (Cd. 6451).

challenging as violations of the Hay-Pauncefote Treaty of November 18, 1901, (1) those provisions of the above quoted section of the Act of August 24, 1912, relating to American vessels, which we have italicized; also (2) those provisions of section eleven of the Act which prohibit railway companies subject to the interstate commerce laws of the United States from owning any interest directly or indirectly in vessels using the canal with which such railways may compete and which prohibit the use of the canal by any vessel the owner of which is guilty of violating the Sherman Anti-Trust Act; and (3) those provisions of Article XIX of the treaty between the United States and Panama dated November 18, 1903, which reserve to the Republic of Panama the right to use the canal free of charge for certain governmental purposes [1].

It is the purpose of this essay to examine whether the British government has established any violation of the Hay-Pauncefote treaty by sufficient proof.

[1] Article XIX.

The Government of the Republic of Panama shall have the right to transport over the Canal its vessels and its troops and munitions of war in such vessels at all times without paying charges of any kind.

II.

Every presumption of good faith in the observance of a treaty is to be allowed in favor of a nation as against a charge of treaty violation when a difference of opinion has arisen as to the meaning of the treaty involved. The burden of proof rests upon the nation charging the violation.

The strict and full observance of every right and immunity, granted in a treaty by one nation to another is a matter of uberrima fides: but it is equally a condition of uberrima fides that the grantee shall not set up pretensions and make demands not supported clearly by the treaty. Such pretensions and demands, when coupled with a direct or covert allegation of treaty violation in the event they are not complied with, acquire a wholly unjust importance by reason of the unfortunate but undeniably actual circumstance that the mere charge of treaty violation always places the nation against which it is made under suspicion in the minds of many; and imposes upon it the unfair burden of proving a negative, namely, that it has done no wrong.

In the present controversy between Great Britain and the United States it is an important fact that the construction placed by Great Britain upon the

Hay-Pauncefote treaty, if recognized, will result in an unquestionable and an unmixed national profit to Great Britain. On the other hand, it is debatable whether the legislation of the United States, which is called in question, will be a national benefit to the United States. This legislation represents, in its features exempting American vessels from paying canal tolls, a departure from a long standing policy in the United States against the granting of subsidies and as is well known, it was stubbornly opposed by a large fraction in Congress [1].

Great Britain has decidedly more to gain by the controversy than the United States has to lose. In fact, voices are not wanting both in and out of Congress, demanding the repeal of the subsidy in view of this very inequality of the interests at stake.

[1] It is a remarkable circumstance that, almost without exception, those members in Congress who opposed the granting of this subsidy on grounds of internal policy, also saw in it a contravention of the Hay-Pauncefote treaty.

III.

What the attitude of the Wilson administration with respect to this controversy may be is at the time of this writing unknown. It is possible the Act of August 24, 1912, may be repealed. There are, however, deeper and more far reaching questions involved than the mere exemption of American ships from the payment of tolls. Four solutions of the controversy may be considered:

(1) diplomatic negotiations which may lead to mutual concessions and an amicable settlement;

(2) arbitration before the Permanent Court of Arbitration at The Hague;

(3) arbitration before a Commission or Court composed solely of American and British subjects;

(4) submission of the controverted questions to the Supreme Court of the United States.

The first appears to the writer to offer the best hope of a settlement. It is obvious that England's chief concern in this controversy is to champion vigorously the commercial interests of Canada, which is just at this time voting some thirty-six million dollars for British dreadnoughts. Diplomatic history furnishes us all the assurance we need that the most difficult and delicate problems arising between "Uncle Sam" and "The Lady of the

Snows" will continue to yield to the candor and the cordiality which have generally characterized their relations in the past.

The other three proposed solutions are objectionable. Great Britain has suggested reference to The Hague tribunal. As well suggest a tribunal composed solely of Britons. And this is said with due respect for both — indeed in the firm conviction that both would strive equally to be fair. But it offends against that universally admitted maxim that no one should be judge in his own cause. The United States has proclaimed its purpose to the world to guarantee every other nation the same favored position it grants Great Britain in respect to the use of the Panama Canal. And no nation questions that it will be thus favored. In other words, Great Britain and all other nations possessing or likely to possess a navy or a merchant marine, have a common interest against the United States in the prosecution of the British claims.

An arbitral proceeding before a court composed of solely British and American subjects offends doubly against the above mentioned maxim. If a conclusion is reached at all, it is likely to be on the side of those who hold most stubbornly to their own national views. The general arbitration treaty between the United States and Great Britain of

August 3, 1911, may yet be ratified and the whole controversy referred to the commission of inquiry therein provided for, for examination and report.

All suggestions as to arbitration of the present controversy have these two further objections in common: (1) they are at this time premature and based upon a purely conjectural case, and (2) the questions involved are provisions of internal legislation affecting directly only the domestic affairs and the subjects of the United States, and as such may not be annulled or even called in question by any foreign court, arbitral or otherwise. This proposition is so elemental — striking as it does to the very root of the doctrines of national sovereignty — that no nation having reasonable ground for believing that this proposition arises, ought to be criticised for entertaining an honest doubt as to the propriety of submitting itself to such an arbitration.

The proposal made in some quarters,[1] to abide the decision of the Supreme Court of the United States upon the matters in controversy is interesting but impracticable. If the Hay-Pauncefote treaty conflicts with the Act of Congress of Aug-

[1] Cf. Edwd. S. Cox-Sinclair in "The Law Magazine and Review" (London) of November, 1912, page 15, "any aggrieved party has an appropriate, an impartial, and a competent tribunal in the Supreme Court of the United States". He refers the suggestion to M. Buneau-Varilla.

ust 24, 1912, the former is ad hoc rescinded, so far as the government of the United States is concerned. The courts of the United States are powerless to review the acts of the legislative department unless these contravene some right guaranteed by the Constitution of the United States. It is difficult to see how the British government or a British subject could establish this indispensable predicate. Aside from these considerations, it is clear from recent decisions of the Supreme Court that the "Canal Zone" is not a corporate part of the United States to which the benefits of the Constitution extend. In the case of Coulson vs. The Government of the Canal Zone, (reported in Vol. 212, U. S. Supreme Court Reports, page 553) it was decided that a writ of error to review a judgment of the Supreme Court of the Canal Zone must be dismissed for want of jurisdiction. Another phase of the same question was presented in the case of Kaufman vs. Smith (reported in Vol. 206 U. S. Supreme Court Reports, page 610) in which the Court held:

> "The questions involved in this case as to the right of the Government to collect duties on merchandise coming into the United States from the Canal Zone, under the act of March 2, 1905, have already been settled by the case of Downes v. Bidwell (182 U. S. 244), and the writ of error is dismissed for want of jurisdiction".

Downes vs. Bidwell is the celebrated case in which the Supreme Court decided that the Constitution of the United States did not extend to the island of Porto Rico.[1]

We have thus far sought to clear the ground of some preliminary and incidental aspects, some of which have persistently been distorted to cloud the issues and create, if possible, a prejudice against the action of United States. International jurisconsults, who are worthy of the title, will

[1] It is worth noting parenthetically that the Supreme Court of the United States has already committed itself in a case (Olsen vs. Smith reported in Vol. 195, U. S. S. C. Reports [1904] at page 332) presenting features, analogous to the present controversy. It was in this case urged that a statute of the State of Texas exempting American coasting vessels from the payment of pilotage charges was a violation of the treaty of 1815 between the United States and Great Britain which provides in its second Article:

"That no higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States".

The court, in discussing this phase of the case, at page 344, says:

"Neither the exemption of coastwise steam vessels from pilotage, resulting from the law of the United States, nor any lawful exemption of coastwise vessels, created by the State law, concerns vessels in the foreign trade, and, therefore, any such exemptions do not operate to produce a discrimination against British vessels engaged in foreign trade and in favor of vessels of the United States in such trade. In substance the proposition but asserts that, because by the law of the United States steam vessels in the coastwise trade have been exempt from pilotage regulations, therefore there is no power to subject vessels in foreign trade to pilotage regulations, even although such regulations apply, without discrimination, to all vessels engaged in such foreign trade, whether domestic or foreign."

approach this controversy with an open mind, for it is certainly not free of doubts and difficulties.

We shall now endeavor to sketch briefly the Isthmian Canal legislation of the United States and the motives of paramount national importance which led the United States to assume the immense and hazardous task of building the Panama Canal; after which we shall proceed to an examination of the Clayton-Bulwer treaty of April 19, 1850, in its relation to the Hay-Pauncefote treaty of November 18, 1901; and then to the examination of the latter treaty in its bearing upon the Act of Congress of August 24, 1912, and the British protest heretofore outlined.

IV.

National concern in the United States with reference to the ownership and management of an Isthmian canal manifested itself as early as 1835, when President Jackson in compliance with a resolution of the Senate[1] advising negotiations, particularly with the governments of Central America and New Granada, "for the purpose of effectually protecting" a ship canal connecting the oceans, sent Col. Charles Biddle to Nicaragua, Guatemala

[1] Cf. Resolution of March 3, 1835, in Senate Journal, 23. Congress, 2. Session, page 238.

and Bogota to investigate routes, and procure copies of any laws passed or conventions entered into with foreign powers with relation to the canal. That Lord Palmerston requested to be informed by the United States as to the purpose of this mission, is significant, for it marks the beginning of an attitude of mutual suspicion and of a contest of diplomatic intrigue, in Central America with the Isthmian Canal as its object, between these two great nations, which lasted twenty-five years.

Under date of the 12th of December, 1846, the United States concluded "a general treaty of peace, amity, navigation and commerce" with the Republic of New Granada (now Republic of Columbia) as to which ratifications were exchanged the 10th day of June 1848. It represents another step in the struggle with Great Britain for the control of the canal route. How vital to its welfare the American Union regarded its possession of this control is clearly deducible from the fact that it sacrificed, not without misgivings, however, its deeply ingrained policy of avoiding, entangling alliances with foreign nations.[1]

In Article XXXV of said treaty, "as an especial

[1] Cf. The message of President Polk transmitting this treaty to the Senate, Feb. 10, 1847. Executive Journal VII, pages 191—193.

compensation for the advantages" therein recited, the United States guaranteed to New Granada, "positively and efficaciously the perfect neutrality" of the Isthmus of Panama and the interocean transit thereon, and also "the rights of sovereignty and property which New Granada possesses over the said territory" — a defensive alliance directed against the only Power that was at that time hovering about these coasts. In all subsequent negotiations with Columbia and in all communications with foreign nations thereafter, the United States consistently maintained the position that it was by this treaty created sole guarantor of the "free transit from the one to the other sea" across the Isthmus of Panama, and as such entitled to take any steps upon the Isthmus, and to exercise such control over the Isthmus as might in its judgment be necessary to perform its obligation in this respect [1]. And this power was repeatedly exercised by the United States.

So stood matters precisely when the Hay-

[1] Cf. for example, the Resolution declaring that the consent of the United States is a necessary precedent to the construction of any canal, Feb. 16, 1881. Senate Miscellaneous Documents No. 42. 46th Congress, 3rd. Session. Also the report of the House Committee declaring that the United States will assert and maintain their right to possess and control any such canal, no matter what the nationality of the promoters or the source of their capital may be, March 3, 1881, House Report No. 390, 46th Congress, 3rd Session.

Pauncefote treaty of 1901 was negotiated. The treaty of 1846 with New Granada was still in force.

Following the treaty of 1846 relating to the Panama route, agents of the United States were active also in negotiating with the government of Nicaragua for the control of the Nicaragua route (the Hise-Selva convention of June 21, 1849, and the Squier-Zepeda general treaty of September 3, 1849). To offset this diplomatic advantage, Great Britain was seizing territory on one pretext or another along the Mosquito Coast and in Belize and threatening to take the port of San Juan de Nicaragua (Greytown) in order to get the strategic control over the proposed interoceanic highway by way of Lake Nicaragua. The control of this canal route, important as it was thought to be to the welfare and safety of the United States, was apparently to be won only at the cost of another vital national policy, namely, that the Western Hemisphere should not be made a field of future colonization by European powers. To avert the inevitable issue of this unfortunate contest in Nicaragua, the Clayton-Bulwer convention (signed at Washington, April 19, 1850, by John M. Clayton, Secretary of State and Sir Henry Lytton Bulwer, the British Minister at Washington) was concluded.

From the very moment of exchanging ratifications, and for ten years thereafter, this treaty was a Pandora's box of difficulties and misunderstandings, many of which remained undetermined till the treaty was abrogated. It is notorious that Great Britain violated it.[1] At one time, indeed, the United States declared that the treaty had outlived its purpose and was voidable at its pleasure; and in accordance with this view negotiated a treaty with Nicaragua (the Frelinghausen-Zavala convention dated December 1, 1884) in which the United States engaged to build the canal at its own cost and to enter into a "perpetual alliance" with Nicaragua. While the latter convention was pending in the Senate for its "advice and consent", the political complexion of the government changed and President Cleveland, without expressing any opinion as to the Clayton-Bulwer treaty, withdrew the Nicaragua convention from the Senate, principally on the ground that its provisions relating to an "alliance" offended against a long standing policy of the United States.[2] It was never resubmitted.

[1] Cf. The article "Clayton-Bulwer Treaty" in Encyclopaedia Britannica, 11th Edition.

[2] See President Cleveland's annual message of Dec. 8, 1885 (Foreign Relations, 1885, Page V).

Just how much of the Clayton-Bulwer treaty, if any, was in force at the time it was superseded in 1901, and what fragments of it, if any, had any practical application to the radically changed conditions, is one of the riddles of diplomacy which some modern Oedipus may solve. We shall in a subsequent paragraph hazard an opinion as to the meaning of the reference in the preamble of the Hay-Pauncefote treaty to Article VIII of the Clayton-Bulwer treaty.

In 1855 the Panama railway owned by Americans, was opened under a liberal concession from the government of New Granada, obtained in 1848. This granted the concessionaire the exclusive right to construct a railway or canal in a certain territory, which gave it complete control of the Panama isthmian transit. The concession, by subsequent modifications, extends for a period of ninety-nine years from 1867.[1] From the beginning, this railway has stood under the protection of the United States as sole guarantor of the neutrality of the Panama route. When the French in 1878 obtained their concession from the United States

[1] It is interesting to note that this concession, though now owned by the United States, has never been allowed to merge into any superior or sovereign right of the United States in Panama. The railway company is still operated as a private corporation chartered under the laws of the State of New York. There are practical reasons for maintaining it as a separate entity.

of Columbia to build the Panama Canal, it was on condition that they would make satisfactory arrangements with the Panama Railroad Company, which they accomplished by purchasing the shares of the company at a high figure (some $ 16,000,000).

The tragic failure of the French put the seal of doom upon the Panama sea-level canal, and when the events of the Spanish-American war of 1898 emphasized the strategic necessity of an Isthmian canal, the popular imagination in America supported by the conclusions of eminent engineers, turned to the Nicaragua route as the only solution. The Clayton-Bulwer treaty, however, which related to the Nicaragua route, in terms forbade the absolute control and ownership of this route by either of the contracting parties. The negotiations for the abrogation of this treaty resulted in the Hay-Pauncefote treaty of February 5, 1900; which, however, was amended in the United States Senate to such an extent that further negotiations were necessary. These culminated in the Hay-Pauncefote treaty of November 18, 1901, and the ratifications thereof by both Powers were exchanged at Washington on February 22, 1902.

The feasibility of a lock system instead of a sea-

level canal at Panama brought that route again to the front as a possibility and the President of the United States was directed by the Act of Congress of June 28, 1902, (commonly known as the "Spooner Act") to enter into negotiations with Columbia for "the perpetual control of a strip of land" not less than six miles wide at a suitable place on the Isthmus of Panama and extending from the Caribbean Sea to the Pacific Ocean, together with the right to construct and "perpetually maintain, operate and protect thereon a Canal". Failing in getting such a concession on reasonable terms or within a reasonable time, the President was directed to acquire by treaty the perpetual control of the Nicaragua route, and to proceed with the work of excavating the canal.

A satisfactory treaty between the United States and Columbia known as the Hay-Herran treaty, which was signed on the 22nd of January, 1903, was rejected by the Senate at Bogota; and it was decided to postpone reopening negotiations with the United States till the next session of Congress, more than a year later. This was nettling to the government at Washington which was eager to begin the great work. On the 4th of November, 1903, Panama, one of the states of the Columbian federation, revolted and proclaimed

its autonomy. It was immediately recognized by the United States as an independent sovereignty and its plenipotentiary received by the government at Washington.[1] Under date of November 18, 1903, the United States concluded a treaty with the young republic by which Panama granted the United States "in perpetuity the use, occupation and control" of a zone of land ten miles wide following the canal route, and all other rights necessary in the judgment of the United States for the construction and protection of the canal. The United States in turn guaranteed the independence of the Republic of Panama, paid ten million dollars in cash, and agreed to pay further an annuity of $ 250,000 beginning with the year 1913. In addition to this, some unimportant privileges as to telegraph and canal tolls were extended to the Panama government.

In the early part of May, 1904, the Universal Interoceanic Canal Company (De Lesseps company) transferred to the United States for a consideration of $ 40,000,000 all of its rights and property in Panama, including the Panama railway, and the last obstacle to the great undertaking was thereby removed. The Canal Zone continued

[1] For a detailed statement as to the negotiations with Columbia and Panama, see President Roosevelt's special message to Congress of January 4, 1904. (Foreign Relations, 1903, pages 260—278).

thereafter to be governed by "Executive orders" of the President of the United States, under the implied authority granted by the "Spooner Act", until the law of August 24, 1912, which gave rise to the pending conflict with Great Britain, provided a more adequate and permanent organization for the administration of the canal and the canal territory.

V.

The motives of paramount national importance to the United States which hastened the undertaking of the great enterprise and which were never kept under cover, were threefold, commercial, strategic, and political. As reflecting best these motives we quote from the messages to Congress of Presidents of the United States, as follows: —

> "An interoceanic canal across the American Isthmus will essentially change the geographical relations between the Atlantic and Pacific coasts of the United States, and between the United States and the rest of the world. It will be a great ocean thoroughfare between our Atlantic and our Pacific shores, and virtually a part of the coast line of the United States. Our commercial interest in it is greater than that of all other countries." (President Hayes, message of March 3, 1880.)

> "The construction of three transcontinental lines of railway all in successful operation, wholly within our territory and uniting the Atlantic and the Pacific Oceans, has created new conditions, not in the routes of commerce only, but in political geography, which powerfully affect our relations toward, and necessarily increase our interests in, any transisthmian route. Transportation is a factor in the cost of commodities scarcely second to that of their production, and weighs as heavily upon the consumer. Our experience already has proven the great importance of having the competition between land and water carriage fully developed, each acting as a protection to the public against the tendencies to monopoly which are inherent in the consolidation of wealth and power in the hands of vast corporations." (President Cleveland, message of December 8, 1885.)
>
> "The experiment in tolls to be made by the President would doubtless disclose how great a burden of tolls the coastwise trade between the Atlantic and the Pacific coast could bear without preventing its usefulness in competition with the transcontinental railways. One of the chief reasons for building the canal was to set up this competition. (President Taft, message of December 21, 1911.)

The paramount strategic value of the canal to the United States in time of war is so obvious, and had so impressed itself upon the public mind in the course of nearly a hundred years, that no evidence need be advanced that this was also a leading motive for the building of the canal under the aus-

pices and exclusive control of the United States. The necessity for the isthmian waterway in time of war was most forcibly brought home to the United States shortly before the Hay-Pauncefote negotiations began, when, during the Spanish-American war, the battleship Oregon had to make its famous voyage from San Francisco round Cape Horn to cooperate with the fleet in the Caribbean for the defense of the nation.

The canal was to be built under exclusively American management and control to fulfill and make more secure that well known American policy associated with the name of Monroe. This was well understood by all concerned; and this motive appears in all the negotiations with relation to the canal routes to which the United States was a party from the earliest time. "The policy of this country", said President Hayes, "is a canal under American control. The United States cannot consent to the surrender of this control to any European power, or to any combination of European powers." It is not believed that Great Britain was in 1901 unfriendly to this policy. In fact, the abrogation of the Clayton-Bulwer treaty of 1850 was designed to have the effect of restoring the United States to a position where she could freely execute this policy of

exclusive control, and thus more effectually secure the Western Hemisphere against possible European aggression.

VI.

No more fundamental error is committed generally by those defending the British view in the present controversy than appears in the following statement of the government's protest: "The Hay-Pauncefote treaty does not stand alone. It was the corollary of the Clayton-Bulwer treaty of 1850."

The Hay-Pauncefote treaty contains five articles and the very first article unconditionally abrogates the treaty of 1850. Article I: "The High Contracting Parties agree that the present Treaty shall supersede the aforementioned convention of the 19th of April, 1850." It would be difficult to say any more clearly that the parties intended to give that maimed and decrepit instrument a decent burial. But its ghost has risen with all the deformities it had incarnate, and as few people see spectres alike, we may be pardoned for attempting to analyze this one.

The preamble to the Hay-Pauncefote treaty furnishes the trap door through which this spectre comes upon the scene. Both parties, it is recited, being desirous to facilitate the construction of a

ship canal "and to that end to remove any objection which may arise" out of the Clayton-Bulwer convention "to the construction of such canal under the auspices of the Government of the United States, without impairing the 'general principle' of neutralization established in Article VIII of that Convention . . . . . have agreed upon the following Articles."

The said Article VIII is an agreement between Great Britain and the United States "to extend their protection by treaty stipulations (which were never entered into) to any other (than the Nicaragua route) practicable communications, whether by canal or railway, across the Isthmus which connects North and South America". This clause is placed in the Article itself in apposition with "general principle". It is significant that these two words in the preamble to the Hay-Pauncefote treaty, are in quotation marks and must have direct reference to this particular passage in Article VIII. In the second sentence of Article VIII, it is provided that this protection is conditioned upon the owners of the canal or railway, imposing only such charges and conditions as the aforesaid governments (and those who may later join them) shall approve, and further upon their agreeing that the canal or railway shall be open on equal terms to

the subjects of every state which is willing to grant such protection as the United States and Great Britain engage to afford.

These provisions in their entirety, all the particulars of this Article are to be reduced to a general principle, or general principles. If that be possible, we are to test the result by the definition of neutralization. If that test is met, we have discovered that evanescent fragment of the Clayton-Bulwer treaty which is negatively referred to in the preamble to the Hay-Pauncefote treaty. If we are candid, we must admit there is no rule of logic that will make this coveted conclusion possible. What the Article itself denominates a "general principle" is neither such in the ordinary sense of the words nor does "protection" by two nations constitute neutralization.

The British protest of November 14, 1912, strives to generalize Article VIII as follows: "Joint protection and equal treatment are the only matters alluded to"; and the argument is made that, as there is no belligerent action mentioned in the Article, "neutralization" must refer to equal treatment. But "joint protection" and "equal treatment" cannot rightly be disassociated from the conditions indispensably prerequisite to their existence, namely, for the former, concluded treaty stipula-

tions, for the latter, the assent of the owners of the canal or railway. We might with as good reason say "Treaty stipulations for the joint protection of the canal and the agreement of the owners to the terms on which this protection is offered, are the only matters alluded to", and since there are no belligerent features in the latter, the "neutralization" spoken of must refer to the obtaining of said treaty stipulations. Neither is it true as a fact that only joint protection and equal treatment are alluded to — the veto right as to charges and conditions of traffic, for instance. Moreover the words "joint protection" and "equal treatment" do not constitute the statement of a "general principle", to say nothing of the inexactness of defining the "equal treatment" contended for, disconnected from every idea of neutrality, as neutralization.

The British protest argues further that "if the canal had been constructed while the Clayton-Bulwer treaty was in force it would have been open under Article VIII to British and United States ships on equal terms" — that is, if the canal, in conformity with the treaty, had been constructed by neither Great Britain nor the United States, and if the owners, whoever they might be, had agreed to concede the privileges recited in the Article as the

price of the protection offered, but which they were in no wise obligated to accept. Keeping the terms of the Clayton-Bulwer treaty in mind, the British argument appears correct. Article VIII recognizes the relation to the owners of the canal of all nations that joined in the offer of protection to be that of non-owners; and the privileges granted by the owners to two of such nations were to be granted to all equally — their relation to the canal owners was to be that of most favored nations. This view bears out precisely the contention of the United States that they occupy today the position of owners of the Panama Canal and all other non-owners occupy the position of most favored nations. Those who do not see that this contention is supported by Article VIII aforesaid fail to appreciate the fact that the relation of Great Britain to the canal project is substantially the same today as it was in 1850, whereas the United States has stepped out of the class of non-owners it then occupied in common with Great Britain and other nations and has succeeded exclusively to the position and the rights of the opposite party, referred to in Article VIII as the one "constructing or owning" the canal. It was the very purpose of the Hay-Pauncefote treaty to effect this exchange of

positions; and the interpretation of Article VIII of the Clayton-Bulwer treaty ought not to disregard and seek to defeat this purpose. It is unreasonable to advance claims which magnify the relation and enlarge the rights of Great Britain beyond those she would have had if the canal had been constructed in 1850. In 1901, the British government itself declared that it had no intention then of giving "to Article VIII of the Clayton-Bulwer Treaty a wider application than it originally possessed."[1]

The negotiations leading up to the Hay-Pauncefote treaty and the relevant facts and circumstances then existing throw a strong light on the possible meaning of the reference to Article VIII in the preamble to the treaty.

The Clayton-Bulwer treaty, it should be emphasized, was never at any time in effect as to any canal route but the Nicaragua route. Before 1901, the United States was entirely free to build an isthmian canal without consulting Great Britain, by any one of the other eighteen different routes that had been surveyed and declared feasible. By virtue of her treaty of 1846 with New Granada, she was directly and solely charg-

[1] Marquis of Lansdowne, Foreign Secretary, to Lord Pauncefote, October 23, 1901. Parliamentary Papers, United States, No. 1 (1902), 8.

ed with the protection of the Panama route. Great Britain was well aware of these facts. They gave her concern. Lord Lansdowne, who represented Great Britain in the framing of the Hay-Pauncefote treaty, suggested amendments "for the purpose of removing any doubt which might possibly exist as to the application of the treaty to any other interoceanic canals as well as that through Nicaragua".[1] After the United States Senate had rejected the first Hay-Pauncefote treaty because it did not explicitly abrogate the entire Clayton-Bulwer treaty and especially the provisions of Article VIII relating to the adherence of other Powers, new negotiations resulted in the unconditional abrogation of the latter treaty. The substance of the rules which the United States was to adopt (Article III) as the basis of the neutralization of the proposed canal (all parties had the Nicaragua route then in mind), was acceptable to Great Britain. But Lord Lansdowne's doubt as to the application of these rules to other routes, should the Clayton-Bulwer treaty be unreservedly abrogated, led him to propose the following additional article "on the acceptance of which His Majesty's Government would probably be pre-

[1] Ibidem.

pared to withdraw their objections to the formal abrogation of the Clayton-Bulwer convention":

"In view of the permanent character of this treaty, whereby the 'general principle' established by Article VIII of the Clayton-Bulwer convention is reaffirmed, the High Contracting parties hereby declare and agree that the rules laid down in the last preceding Article (Article III) shall, so far as they may be applicable, govern *all* interoceanic communications across the isthmus which connects North and South America, and that no change of territorial sovereignty, or other change of circumstances shall affect such general principle or the obligations of the High Contracting Parties under the present treaty."[1]

These provisions represent the utmost of what the British government wished to save of the Clayton-Bulwer treaty. It is to be observed they contain no words intended to amend or enlarge any substantive rights recited in careful phraseology, in a different Article (Article III). They are intended (1) to extend the neutrality rules as a "general principle" to *all* routes across the isthmus and (2) to make them effective regardless of a change of sovereignty, or other

[1] Memorandum of Lord Lansdowne, Aug. 3, 1901, Parliamentary Papers, United States, No. 1 (1902), 2.

change of circumstances. The latter provision was embodied in a new Article (Article IV of the Hay-Pauncefote treaty) and the former provision was abandoned upon its being brought to the attention of Lord Lansdowne by Secretary Hay that the language of the preamble covered it.

It is manifest, therefore, that the phrase "the 'general principle' of neutralization established in Article VIII", occurring in the preamble to the Hay-Pauncefote convention, was then understood by Great Britain to mean only that the rules laid down in Article III for the neutralization of the canal should apply not alone to the route affected by the Clayton-Bulwer treaty, but should govern "any other practicable communications across the isthmus which connects North and South America; and especially the interoceanic communications . . . . which are now proposed to be established by way of Tehuantepec or Panama", as defined in the words "general principle" occurring in Article VIII itself.

Still another view may be taken of Article VIII aforesaid with considerable plausibility, namely, that it creates a sort of partnership relation between Great Britain and the United States and that the "general principle" mentioned is the same

as lies at the base of all mutual undertakings, that is, equality of benefits and of burdens. Under the rejected Hay-Pauncefote treaty of 1900, which expressly provided that Great Britain should share with the United States the burden of protecting the canal, the foregoing construction might be applicable. But it is apparent at a glance that it has no application whatever under the ratified treaty of 1901, by the terms of which the United States alone assumed this burden. As Lord Lansdowne then said, "It is to be borne in mind that, owing to the omission of the words under which this country became jointly bound to defend the neutrality of the canal, and the abrogation of the Clayton-Bulwer treaty, the obligations of Great Britain would be materially diminished. This is a most important consideration".[1] It seems now to have become utterly insignificant in the British mind. Article VIII contains no hint of equal benefits disassociated from the obligation of joint protection.

It is useless to elaborate further the views of the British government at different times and of others as to the possible meaning of "the 'general principle' of neutralization established

[1] Memorandum of Lord Lansdowne to Mr. Lowther, chargé d' affaires, August 5, 1901, Parliamentary Papers, United States, No. 1 (1902), 2.

by Article VIII". It will not be denied the meaning is debatable. Even those on the same side of the present controversy do not interpret the passage alike. It is especially difficult to generalize into a principle the particulars of Article VIII without disregarding some that appear there or interpolating others that do not; and if we are to accept the British government's allegation "that there is no mention of belligerent action in it at all", it is impossible to find in the Article any application of the idea of neutralization whatever.

It is a fortunate circumstance that this ambiguous reference to the Clayton-Bulwer treaty is no part of the agreement between the parties to the Hay-Pauncefote treaty. This agreement is found in what succeeds the words "have agreed upon the following Articles". The preamble to a treaty may be consulted when the language of the treaty itself is ambiguous and requires interpretation; but it is folly to resort to a preamble itself ambiguous and requiring interpretation, before we have exhausted the ordinary and accepted rules of interpretation upon the treaty proper. The preamble to a treaty even when conceived in clear, precise, and unmistakable terms, can in no event be resorted to to contradict the plain language of

the treaty, nor to enlarge or restrict rights therein solemnly defined. This appears axiomatic.

We believe the meaning of the Hay-Pauncefote treaty can be found within the four corners of the treaty itself. "To go elsewhere in search of conjectures, is to endeavor to elude it". From the standpoint of abstract justice, the pretension of Great Britain that she should be put on the same footing as respects the use and enjoyment of the Panama Canal as the United States, seems presumptuous. The restriction which she invokes against the sovereign right of the United States to enact legislation affecting its internal affairs, must appear in express language[1] in the Hay-Pauncefote treaty. No mere implication or argumentative deduction will suffice. And if we adopt the rule Lord Clarendon applied against the United States in construing the Clayton-Bulwer treaty in the case of the Mosquito Indians, to the effect that "the true construction of a treaty must be deduced from the literal meaning of the words employed in the framing", it will be hard indeed for Great Britain to prove her claims.

[1] Cf. Hall, W. E., International Law (5th Edition) P. 335.

VII.

We purpose now to examine the Hay-Pauncefote treaty in the light of the first rule of interpretation recognized generally by writers on international law, expressed by a high British authority as follows:

"When the language of a treaty, taken in the ordinary meaning of the words, yields a plain and reasonable sense, it must be taken as intended to be read in that sense, subject to the qualification that any words which may have a customary meaning in treaties, differing from their common signification, must be understood to have that meaning." [1]

Article I of the Hay-Pauncefote treaty repeals the Clayton-Bulwer treaty in plain terms without condition or reservation; and not even a positive and unmistakable reservation occurring in the preamble to the Hay-Pauncefote treaty could have saved any paragraph of it against the unconditional repeal contained in said Article I. It is to be presumed that the remaining Articles of the new treaty embody whatever principles of the old treaty the parties desired not to impair. We shall, therefore, dismiss the Clayton-Bulwer treaty from

[1] W. E. Hall. op. cit. page 350.

further consideration and proceed to examine 1) the doctrine of equality involved in Rule 1 of Article III, with special reference to the meaning of the expression "on terms of entire equality"; and 2) the doctrine of neutralization involved generally in Article III, with special reference to the meaning of the expression, "The United States adopts as the basis of the neutralization of such ship canal the following rules"; and 3) the doctrine of most favored nations with special reference to the meaning of the expression in Rule 1 of Article III, "all nations observing these rules".

VIII.

Article II of the Hay-Pauncefote treaty recognizes that the United States shall enjoy all the rights incident to the ownership of the canal and expressly confers upon her "the exclusive right of providing for the regulation and management of the canal". These prerogatives and powers, under Article II, are undefined and unlimited, and may be exploited by the United States in time of war as well as in time of peace. They are tantamount to ordinary rights of sovereignty. If there are any restrictions upon the exercise of

these recognized rights and powers they must be expressed distinctly in the remaining articles of the treaty.

Article III imposes a restriction — namely, it neutralizes the canal in the sense in which the Convention of Constantinople neutralizes the canal at Suez. The scope of this restriction is the battle ground of the present conflict. This much may be said in advance, being in derogation of rights of sovereignty and of property of the United States, this restriction is certainly not to be enlarged by implication.

For convenience of reference in our further discussion and especially for the light it throws upon what the second Hay-Pauncefote treaty does not mean, we have superimposed Article III thereof upon Article II of the first Hay-Pauncefote treaty. The rejected words of the treaty of 1900 are ruled through, the additions made by the treaty of 1901 are enclosed and italicised, and what the two have in common appears in ordinary type.

~~Article II~~ — *(Article III)* — ~~The High contracting parties~~ *(The United States)* ~~desiring to preserve and maintain the "general principle" of neutralization established in Article VIII of the Clayton-Bulwer Convention adopt~~ *(adopts)* as the basis of ~~such~~ *(the)* neutralization *(of such ship*

canal) the following rules, substantially as embodied in the convention between Great Britain and certain other powers *(of Constantinople)* signed at Constantinople, October 29, 1888 *(the 28th October, 1888)* for the free navigation of the Suez Maritime Canal, that is to say:

1. The canal shall be free and open in time of war as in time of peace, to the vessels of commerce and of war of all nations *(observing these Rules)*, on terms of entire equality, so that there shall be no discrimination against any *(such)* nation, or its citizens or subjects in respect of the conditions or charges of traffic, or otherwise. *(Such conditions and charges of traffic shall be just and equitable.)*

(The remaining subheads of this Article in both treaties contain the same provisions, with the exception of subhead 7.)

7. No fortifications shall be erected commanding the canal or the waters adjacent. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

(The foregoing sentence was moved to subhead 2 in the later treaty.)

IX.

The British government contends that the phrase in Article III "on terms of entire equality", in its bearing upon the present controversy, means that the rate of tolls for vessels of commerce and of war of Great Britain and the United States shall be identical ("identical tolls"); and that the United States may not exempt even her own ships of commerce (and of war!) from the payment of said identical tolls, for that would increase the relative burden of Great Britain for the upkeep of the canal to such an extent that the "conditions and charges" would not be "just and equitable".

To say that "identical tolls" exhausts the concept of "entire equality"[1] is in our opinion altogether too narrow a position. Prof. Kaufman of the University of Berlin, though supporting generally the British protest, recognizes the power, indeed he contends it is the duty, of the United States under the Hay-Pauncefote treaty, to equalize the benefits of the canal to all nations either by levying compensatory (differential) tolls against any ships whose governments pay their canal

[1] "Equal=impartial, not biased, just, equitable, not unduly favorable to any party, as the terms and conditions of the contract are equal, equal laws". — Century Dictionary.

tolls for them, or by excluding such ships unconditionally. This is a partial recognition of the principle of equality[1] involved. Article III of the treaty itself, however, takes a much larger view, for it includes in the determination of equality not only tolls but "conditions of traffic" as well, and bars further every form of discrimination in respect of the use of the canal, even outside of said conditions and charges, that would result in inequality. This opens up a wonderful vista of power and responsibility. The United States have assumed far more than a nominal and formal obligation towards the commerce of the world, as for instance, is imposed by the concession of 1856 upon the Suez canal corporation, whose aim is dividends for its shareholders. The United States are the "Interstate Commerce Commission" of the world — to employ an allusion to a well known institution of theirs — in respect of all traffic that uses the Panama Canal route. To what extent they will exercise this power and discharge this responsibility is a matter of their own sense of duty and propriety, and need not be speculated about here. They will do their own shipping an injustice if they do not exercise this power freely.

[1] Cf. Kaufmann, Wm. "La Loi américaine du 24 août, 1912" in Revue de Droit International et de Législation comparée, Vol. XIV (1912).

The thing to be emphasized here is that they are the sole judges of what conditions of traffic are just and equitable. The Hay-Pauncefote treaty confers no veto right on Great Britain. It ill behooves Great Britain to seek to prescribe to the United States any standard of equality at all, and least of all to say to them that equality is attained by the levying of identical tolls, irrespective of other conditions of traffic.

"Tolls based upon the value of the service rendered by the canal are justifiable"[1] said the traffic expert appointed by the President, and no one will deny the fairness of this rule. Identical tolls would actually lead to injustice, unless we assumed that the value of the service rendered would be identical in every case, which would not be true. The government of the United States can and may yet adopt a complex system of charges and conditions for the use of the canal, which will in its judgment equalize the benefits of the canal for all shipowners. It may vary the tolls according to the nature of the cargo, for passengers according to the time and expense saved, it may increase [or decrease the

[1] "Panama Canal Traffic and Tolls" — Report of Dr. Emory R. Johnson, Washington, 1912, page 201. The British protest uses almost the same language.

tolls relatively with the tonnage, may charge ships in ballast a lower rate, may discriminate in favor of sailing as against steam vessels, and so forth. It may, as the British government does in the Manchester ship canal, adopt a graduated scale of tolls increasing relatively with the distance of the voyage to the canal "from the most distant port of lading" or from the canal "to the most distant port of destination". These and numerous other industrial and commercial factors may enter into the determination of the value of the service rendered and of the corresponding tolls that should be imposed, so that the citizens and subjects of all nations may enjoy the benefits of the canal on terms of entire equality. We wish to emphasize that the United States is in no wise restricted to "identical tolls", to a rigid, inflexible "flat" rate of tolls, if the other "conditions of traffic" are such, as in its opinion are unequal and justify a reduction or increase of tolls in any given case. Great Britain assesses against a British vessel sailing from the east coast of North America up to the Latchford Locks of the Manchester Ship Canal a rate of tolls five times higher than against a British vessel sailing from the Isle of Man and more than double as much against a cargo of hardware as against a cargo

of flour. She would hardly admit she was discriminating against her own subjects, and that these charges are not just and equitable.

The United States has determined to deviate from the rule of "identical tolls" in favor of her coastwise shipping. Great Britain protests that this exception is unjustifiable and violates the "equal treatment" guaranteed British ships by the Hay-Pauncefote treaty. Entirely apart from the fact that this exception is no discrimination against British ships for the reason that they were by a previous statute excluded from the coastwise trade of the United States and are therefore not affected one way or the other, there are other "conditions of traffic" as respects the use of the canal, so unequal, as between British vessels and American vessels, some of them coupled directly with the exemption of tolls, as to make it doubtful if the inequality does not still bear down upon American vessels. Identical conditions, identical tolls. But where the United States, as sole arbiter, assesses different tolls, the existence of different conditions, which it is sought to equalize, must be presumed. Without, therefore, wishing to put in issue the sufficiency of these conditions to justify the exemption of American vessels from the payment of tolls, let us examine

the relation of British shipping and of American shipping to the canal. It is of course impossible in this short essay to exhaust the treatment of these relations in all their complexity.

The tonnage of British steam and sailing vessels is greater than that of all other maritime nations combined. It is reasonably certain that a far greater tonnage of British vessels will receive the benefits arising from the use of the shortened route through the canal than of American vessels, and that, too, for many years to come. This superiority of tonnage will give British subjects a far more favored position in the use of the canal than American subjects not only in the matter of keeping their established trade proof against American competition, but also in respect of the new trade which will be made profitable as the direct consequence of the opening of the canal — and not only in respect of the transportation of goods in such trade, but more especially in respect of winning the new markets for the exclusive sale of British products. It is certain that for many years the bulk of the goods of American manufacturers will have to be carried to the west coast of South America in foreign bottoms, mostly British. Many other secondary factors, such as way station freights

favorable shipping combinations and pools, and governmental subsidies, for all of which American vessels have no equivalent, combine to increase the actual advantage of British shipping not only generally, but also directly in respect of the traffic through the Panama Canal. On the other hand, the owners of British ships have contributed nothing to the vast expenditure of human energy and skill and human life at Panama, and they carry no part of the burdens and risks of the building, operation and protection of the canal, nor are they as a class subject to the special restrictive conditions as to the use of the canal imposed in the Canal Act upon American shipping.

Aside from the fact that American shipowners are liable, as subjects of the Power charged with maintaining the neutrality of the canal, to be called upon to offer their lives and their property for the benefit of British trade, and aside from the fact that they carry their share of the enormous debt contracted to build the canal and are taxed, with small hope of being refunded, for the maintenance and protection of the canal and the payment of the interest on the public debt, the inequality is heightened by peculiarly onerous restrictions as to the use of the canal

contained in Section 11 of the Act of August 24, 1912.

The Panama Canal is therein made an agency for working out certain internal policies of the United States, the practical effect of which course is to impose "conditions of traffic" on American ships for which the exemption from tolls is a poor compensation. As a condition precedent to the use of the canal, American ships are subjected to far reaching restrictions as to ownership and traffic agreements that cripple them in their power to compete with British ships using the same route. To give just one example, the Southern Pacific Railway running between New Orleans and San Francisco, is prohibited from having any interest directly or indirectly, in the remotest way, in the operation of an American vessel sailing between San Francisco and Liverpool by way of New Orleans, because there would be a "possibility of competition" between them. On the other hand, a British railway or association of railways in Liverpool may operate or own outright a British vessel competing with the American vessel over the same route. Any one familiar with modern traffic arrangements will see at a glance that the American ship will return from Liverpool in ballast only to wage

an unequal battle in its own home port with its subsidized British competitor. Nor is there any "condition of traffic" imposed in said act upon the British vessel that it may not even make an alliance with the American railway for special favors as to business so as to crush its competitor in both ports. What chance has an American ship for business in a German port where State owned railways stand in most intimate relation with Germany's merchant marine, the nation's auxiliary navy?

To illustrate another phase of these restrictions, the British steamships owned by the Grand Trunk or any other Canadian railway may sail without hindrance from Halifax to Victoria through the canal, whereas the steamships of the American Pacific Mail Company or of the Morgan Line to get from New York to San Francisco *would have to sail round Cape Horn.*

Nor is this all. The act provides further:

"No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress of July 2, 1890, entitled

An Act to protect trade and commerce against restraints and monopolies (commonly known as the Sherman Antitrust Act)".

Recent history has shown how drastic and disturbing is the operation of the Sherman Act. That its effect is restrictive upon commercial enterprise and expansion — especially as relates to foreign trade — is certain. That it is a breeder of litigation to vex prosperous undertakings of magnitude is equally certain. The danger of its operation is enhanced beyond measure for vessels using the Panama Canal by the exceptional provision of the Canal Act that "suit may be brought by any shipper" to enforce the above quoted prohibition against any vessel whose owner is suspected of violating the Sherman Act.

There is another "condition of traffic" which is exceedingly restrictive of the freedom of American vessels using the canal. The Interstate Commerce Commission is by the same act given full authority among other things to regulate the transportation of property within the United States by railroad and water through the canal, and "to establish through routes and maximum joint rates between and over such rail and water lines and to determine all the terms and conditions under

which such lines shall be operated in the handling of the traffic embraced". Private capital is usually very slow to invest in any enterprise under such a sweeping restriction. Sea going commerce, as a matter of fact, can be made profitable only under conditions of very large freedom; and rate regulation of such commerce has not heretofore been deemed practicable. We haven't heard of British ship owners falling over one another to take out American registry.

The British government has given notice that it would protest if any of the above discussed restrictions laid down in the Act of August 24, 1912, are "intended to apply under any circumstances to British ships"; from which it is apparent that it recognizes them to be conditions of traffic that are onerous. At no time does the inconsistency and selfishness of the British government's attitude stand out more clearly than when it demands for British subjects (already enjoying a superior position) the beneficial conditions of Section 5 of the Canal Act, and in the same breath protests against the application of the onerous conditions of Section 11 of the same act to any but American vessels — and that too, though British vessels come into American ports to compete with

American vessels for American traffic, and British (Canadian) railways own permanent branch lines and terminals on American soil and have otherwise unquestionably subjected themselves to the jurisdiction of the United States. If these restrictions and general burdens were shifted exclusively onto British shipowners, and American subjects were freed therefrom to enjoy the favored position British subjects enjoy as to the Canal today, in a word, if the situations of the parties were reversed, we should probably find the British government still protesting. If the United States is prohibited by the Hay-Pauncefote treaty from discriminating against "the citizens or subjects" of all nations, it certainly cannot be expected to discriminate against its own, "in respect of the conditions or charges of traffic, or otherwise".

In consideration of these unequal conditions, the United States, as sole arbiter, has endeavored by compensatory measures to equalize the benefits of the canal route. She has exempted American vessels in the coastwise trade from tolls and has left it to the discretion of the President to aid American vessels engaged in foreign trade. As the President has

not yet exercised this discretion as to the latter vessels and may never do so (though there are good reasons why he should), only the former vessels have received special benefits to offset the inequality of the conditions imposed upon them pertaining to the use of the canal, from which British ships are free.

The principal argument advanced by those who defend Britain's position, is that this exemption in favor of American coasting vessels violates rule 1 of Art. III which "provides that the tolls should be just and equitable".[1] They all construe this language to mean that the cost of operation and the interest on the enormous investment at Panama shall be prorated among all the ships using the canal, i. e., "identical tolls".[2] What these self-constituted judges of what is just and equitable would consider a proper rate of interest, none

[1] Quoted from the British government's protest of Nov. 14, 1912.

[2] It may be said incidentally, that the President of the United States, in arriving at the present tentative rate of tolls of $1.20 per ton, did, as a matter of fact, include in his estimate of the total tonnage passing through the canal to be charged with the cost and operation of the canal, 1,000,000 tons representing American coastwise shipping — so that the relative burden of British ships for the upkeep of the canal is reduced precisely as if the tolls were actually collected from said American shipping.

See reply of Secretary of State Knox to the British communication of November 14, 1912, under date of Jan. 20, 1913, and issued as a Parliamentary Paper, 6585.

has ventured to say, but the probabilities are they would not tolerate it for the United States to levy a rate of tolls at Panama that would bring in what Great Britain realizes on her investment at Suez, nor would they on the other hand offer to make good any losses at Panama. However that may be, in this respect their theory admits that the United States is the sole judge of how high or how low the tolls shall be.

The fundamental error of this argument lies in a disregard of the plain language of the treaty. There is no such provision in it as that quoted in the preceding paragraph. The treaty says: the "conditions and charges (not "tolls") shall be just and equitable" (not "identical"). Starting out from the false premise that "conditions and charges" means only "tolls", they proceed to an equally false premise that "identical tolls" exhausts the meaning of "terms of entire equality", and they deduce the false conclusion that only identical tolls can be just and equitable — a deduction neither sound or proper in theory nor recognized by Great Britain in practice.

X.

We have been considering the expression "on terms of entire equality" as if the treaty had added thereto the words "with the United States", and as if the treaty had conferred an unlimited right upon others to demand this equality at the hands of the United States. But neither of these conditions is true. We shall examine in this chapter the meaning of the neutralization of the canal, and endeavor to show that all the rules adopted by the United States in Article III relate to and are effective only during a state of war.

As we have seen, the only limitation which the treaty imposes upon the rights of ownership and the exclusive control of the canal vested in the United States by Article II, is contained in the six rules of Article III designed to secure the neutrality of the canal. Any restriction upon the power of the United States to fix the rate of tolls in time of peace would certainly have been expressed in Article II and does not belong to the rules for the "free navigation of the canal" in time of war.

"Neutralization" is a word which has a customary meaning in treaties, and there is no reason for giving it a different meaning in the present instance. Neutralization is defined in

Murray's Dictionary (London, 1908) as "the action of making neutral in time of war". It is a contradiction of terms to speak of a territory's being neutral in time of peace. Where a considerable number of nations have entered into a compact to respect the neutrality of a country and to guarantee its immunity from attack in future wars, we speak of the act as neutralization and the country as a neutralized state. It is a self-denying agreement, not creative of new rights but only restrictive of existing belligerent powers. It is an innovation to say that neutralization means a "system of equal rights" in time of peace.[1] There is nothing in the long negotiations leading up to the Hay-Pauncefote treaty which indicates that the parties intended to give to neutralization any other than its customary meaning. The very fact that they employed the term indicates that the rules for the neutralization of the canal were to have no relation to or effect during a state of peace. This is borne out further by an examination of the treaty itself.

[1] For a statement of "the objects, which are three in number, of the neutralisation of an inter-oceanic canal" — all relating to a state of war — see Oppenheim, L., "The Panama Canal Conflict", pages 19 and 20. This little book is a compact and strong presentation of the British contention.

Rules 2—6 inclusive of Article III restricting hostilities in and blockade of the canal, the revictualling and passage of warships, the disembarking of troops, etc., and providing for the canal and its works immunity from attack and injury by belligerents in time of war, clearly relate to war and have no operation in time of peace. Rule 1, providing for the free passage of vessels of commerce and of war (corresponding to rule 1 of the Suez rules), is just as much a rule for the neutralization of the canal as rules 2—6, and is included as such expressly for the purpose of keeping the canal open to the ships of all nations without discrimination *in time of war*. No purpose is expressed to make the application of rule 1 any larger than the application of rules 2—6, and if the reader will refer back to page 41, it will be seen that the parties removed all doubt on this point by striking from Rule 1 the clause "in time of war as in time of peace", the significance of which act did not escape the British government.[1]

[1] Cf. Lord Lansdowne's Memorandum of August 3, 1901, Parliamentary Papers, United States. No. 1 (1901), 2.

Nor is this all. The canal is not to be free and open to the vessels of "all nations" in time of war, but only of "all nations *observing these rules*". This fact is persistently disregarded by the British apologists.[1] This important limitation was inserted upon the insistent request of Great Britain herself. She proposed first "all nations which shall agree to observe these Rules", but the United States objected to giving other nations "a contractual right to the use of the canal". In the end, the *fact of observance,* in lieu of the *agreement to observe* the neutrality of the canal was made the condition upon which the nations should be granted the free and equal navigation of the canal. How is it possible for this condition to be fulfilled in time of peace? What is there in these rules for nations to observe except in a state of war?[2] Is the United States

[1] See for instance Oppenheim, op. cit. opening paragraph, where he quotes the whole of Rule 1 verbatim, omitting "observing these rules".

[2] Rule 1 illustrates this point as well as the rules relating to specific acts of hostility. Rule 1 is equally with the other rules to be observed by the nations of the world using the canal. These nations, Great Britain for instance, have nothing to do with the making of the conditions or charges of traffic in time of peace nor with keeping the canal "free and open" in time of peace. Nations can honor this rule in the breach as well as in the performance only during a state of war — — in the performance, by respecting the free and equal use of the canal, in the breach, by committing any act even outside of those specifically pro-

pledged to grant "equality" before these rules have been observed, or before they come into play and while they are not being observed, and in the absence of any agreement that they will be observed?

It must be apparent that rules 1—6 inclusive are, in the customary sense, rules for the neutralization of the canal and relate solely to a status of war; and that all nations while observing these rules as a fact, may send their vessels of war and commerce through the canal without discrimination and under just and equitable conditions.

This is precisely the force and effect of the Convention of Constantinople of October 29, 1888, whereby the Suez Canal was neutralized There is not a word said in that convention about tolls, or terms or conditions of traffic in time of peace. These matters were fully regulated in the canal Concession of January 5, 1856. The owner of the canal not being represented in the Constantinople Convention, and the nations signing that Convention not

hibited in rules 2—6 inclusive, which would in anywise restrict or interfere with either the free navigation of the canal, or the conditions or charges of traffic. This is a blanket rule which covers all the possibilities of interference, direct or indirect, immediate or remote, which are not embraced in the specific prohibitions of rules 2—6.

being parties to the Concession contract, that Convention could not, neither was it intended to affect the operation of the canal in time of peace. During nineteen years prior to the Convention of 1888 the Suez Canal Company had been exercising exclusive control over the canal administering equal treatment to "all ships under like conditions" in conformity with the concession Act; and it has continued since to do so in time of peace by the same authority and without regard to the Convention of 1888.

This Act of 1856 (Article XIV) declared "the great maritime canal from Suez to Pelusium and ports belonging to it henceforth and forever open, as neutral passages to any merchant vessel crossing from sea to sea without any distinction or preference whatever for persons or nationalities". But this doesn't constitute neutralization in any sense, and M. de Lesseps stood almost alone in his protest against the seizure of the canal in 1882 by the British as the base of their belligerent operations in Egypt, when he contended they were violating a neutralized waterway. There was wanting then every provision for the guaranty of the free and open passage of the canal in time of war. The unsettled polit-

ical conditions in Egypt and the then impending danger of an outbreak of hostilities led to negotiations for the neutrality of the canal and the security of navigation therein in time of war. So the Convention of 1888 was adopted "to *complete* (not to displace) the system under which the navigation of this canal had been placed" by the territorial sovereign in the concessions, which had for nineteen years prior thereto satisfactorily regulated the operation of the canal in time of peace. In a parallel sense, the rules for the neutralization of the American canal contained in Article III of the Hay-Pauncefote treaty were to relate to and be effective during a state of war, in order to insure the neutrality of the canal and the free navigation therein at all times; and these rules are not intended to diminish the general rights of control and management of the canal by the United States in time of peace any more than those of the territorial sovereign at Suez were restricted by the Convention of 1888, by which indeed they were explicitly recognized and reserved.

From all of which it is clear that the British demand that the United States abandon the American doctrine of compensatory, or equal-

izing tolls in favor of the British doctrine of identical tolls is at this time both premature and unfounded, because 1) All the rules for the neutralization of the canal at Panama relate only to a status of war and 2) Great Britain is neither observing these rules as a present fact, nor has she agreed that she will do so when they do come into operation.

XI.

Neither is it true that "all nations observing these rules" are entitled to the free navigation of the canal "on terms of entire equality (with the United States)". This is certainly presuming a great deal on the liberality of the United States.

"Vessels of war" as well as vessels of commerce of such nations, the treaty specifically provides, are also to enjoy the use of the canal "on terms of entire equality", and it would be an unheard of absurdity to claim that the United States bound itself to let its enemy, bent on destruction, complacently sail through the canal "on terms of entire equality (with the United States)". Yet this is the logical and inevitable result of the British contention. The rules for the neutralization of the canal at Suez

expressly except the Egyptian government from the operation of the restrictions therein imposed, so that no enemy could claim the right to use the canal on terms of equality with the Egyptian government.

The British government seeks to meet this argument by the assertion that Egypt "within the measure of her autonomy" carried the burden, as the local sovereign, of providing for the defence of her territory and the protection of the neutrality of the canal, and hence the exception made in the treaty was natural and proper; whereas the United States acquired neither the right nor the obligation to defend the Isthmus of Panama and protect the transisthmian canal till after the Hay-Pauncefote treaty became effective; but "now that the United States has become the practical sovereign of the canal His Majesty's government do not question its title to exercise belligerent rights for its protection". The fact is evidently overlooked today which did not escape the British government in 1901, that the United States was then, as it had been ever since 1846, vested by its treaty with New Granada, with the exclusive power and duty of defending the Isthmus of Panama and guaranteeing the neutrality of the interoceanic transit

thereon.[1] There is every reason for believing, in the light of historical facts, that the actual control and responsibility of the United States on the Isthmus of Panama in 1901 were comparable with those of the Egyptian government in Egypt in 1888.

Moreover, under Article IV of the Hay-Pauncefote treaty, no change of territorial sovereignty or of the international relations of the country traversed by the canal should affect the treaty. If "now that the United States has become practical sovereign of the canal" is sufficient reason for Great Britain's disregarding the provision of the treaty which guarantees to all vessels of war treatment "on terms of entire equality", it is difficult to perceive why the same principle should not, by parity of reasoning, apply to vessels of commerce as well, indeed it is difficult to perceive how, under this recognition of the clausula rebus sic stantibus, any part of the treaty survives at all.

There is no use to seek an excuse for recognizing the right of the United States to discriminate against the vessels of war of other nations in the alleged fact of the acquisition of

[1] See ante, pages 15—16.

"practically sovereign" rights at Panama subsequent to the Hay-Pauncefote treaty. The treaty itself contemplates a condition of practically sovereign rights. No sane statesman, knowing the strategic value of the canal and the enormous sacrifices to be made, then believed the United States would undertake to build the canal under any other than practically sovereign control. Article II grants that the United States "subject to the provisions of the present treaty, shall have and enjoy all the rights incident to such construction as well as the exclusive right of providing for the regulation and management of the canal". What larger rights has the United States since acquired? The rights which she acquired by treaty with Panama in 1903 are indeed expressly made subject to the restrictions of the Hay-Pauncefote treaty (See Article XVIII).

The conclusion is irresistible that the parties never intended that "vessels of commerce and of war of all nations observing these rules" should be entitled to use the canal "on terms of entire equality" — with the United States; but on terms of equality among themselves, so that there should be no discrimination against any of them, giving nothing — absolutely

nothing in return for the pledge of the United States to treat them all fairly and equitably at the canal.[1]

The idea that the United States is to be included in "all nations observing these rules" leads to other equally untenable and preposterous conclusions. By a reference to page 40, it will be seen that the United States alone "adopts" the rules for the neutralization of the canal; and the treaty contemplates that these rules may be amplified and supplemented, and a superstructure built thereon (for they are only a "basis") by the United States and by it alone, as it may deem proper or necessary to make the observance of the neutrality of the canal more certain. It is possible, for instance, for the United States to lay down the rule that no warship cleared for action shall be permitted to enter the canal, or that no warship shall be permitted to enter whose commander will not agree to be the guest of the United States during the passage — rules that can, in

[1] It is presumed the Clayton-Bulwer treaty was a mutual compact containing mutual benefits and obligations. The abrogation of this treaty by mutual agreement and the substitution of a new compact therefor can hardly be considered an act of grace on one side only, as the British assume.

their nature, be observed only by other nations. The controlling principle is that the treaty recognizes the power of the owner of the canal to prescribe the conditions upon which others, non-owners, may use its property; that the nation assuming, in Lord Lansdowne's words "the whole responsibility for upholding these Rules, and thereby maintaining the neutrality of the canal" is recognized to have 1) the authority to say to others (not to itself, that would be an absurdity) what rules they must observe and to have 2) the power to decide whether they are in fact observing these rules or not, and, if not, *to exclude them* (not itself — preposterous!) from the use of the canal entirely. This power extends not only to the supplemental rules which it may hereafter adopt but also to those which it has already adopted, as declared in the Hay-Pauncefote treaty.

To say that the United States is included in "all nations observing these Rules" is to contend that her right to use the canal "on terms of entire equality" (with the United States!) is conditioned upon her demonstrating (to the United States!) that she is, as a belligerent, respecting the neutrality of the canal (the property of the United States!) in conformity with

the rules adopted by the United States! This contention is simply incomprehensible.

Nothing was farther from the minds of the parties than that the United States, as the nation solely charged with enforcing the neutrality of the canal, should be prohibited from taking any belligerent action it saw fit to protect the canal; just as the Egyptian government, which is charged with a similar responsibility at Suez, is by the Convention of Constantinople (Art. IX) permitted to "take the necessary measures for insuring the execution of this treaty"; and "the provisions of Articles IV (relating to free passage and hostilities) V (relating to disembarking of troops) VII (keeping war vessels in canal) shall not interfere with the measures which shall be taken in virtue of the present article". Whenever, and as long as the United States deems it necessary for the protection of the canal and the enforcement of its rules, it may, in contravention of rule 1 of Article III, close the canal partially or entirely even against nations "observing these rules"; and it may, for the same reasons, commit any of the warlike acts prohibited in rules 2—6 inclusive. If the United States is bound to "observe these rules" how could it

either enforce its rules or defend the canal against attack, or assert the exclusive rights of control and management granted to it by Article II of the treaty? These things seem so obvious that it is astonishing that anyone would seriously contend to the contrary. That the words "all nations observing these rules", from the very nature of things, did not include the United States was evidenty so clear to the parties in 1901, that it never occurred to them necessary to say "all *other* nations observing these rules", as the British side now contend would have been necessary. Indeed, the latter form of expression might justify a doubt whether the United States was not, too, bound to observe the rules, which is precisely what was not intended.

Very convincing as to the true meaning of the treaty is Lord Lansdowne's official communication to Lord Pauncefote of October 23, 1901, in which he says:

"Mr. Hay had suggested that in Article III, Rule 1, we should substitute for the words 'the canal shall be free and open to the vessels of commerce and of war of all nations which shall agree to observe these Rules', etc., the words 'the canal shall be free and open

to the vessels of commerce and of war of all nations observing these rules', and in the same clause, as a consequential amendment, to substitute for the words 'any nation so agreeing' the words 'any such nation'. His Majesty's Government were prepared to accept this amendment, which seems to us equally efficacious for the purpose which we had in view, namely, that of insuring that Great Britain should not be placed in a less advantageous position than other powers, while they stopped short of conferring upon other nations a contractual right to the use of the canal."

It will be remembered Secretary Hay declined to accept the form, "all nations which shall agree to observe these Rules" because of the "strong objection entertained to inviting other powers to become contract parties to a treaty affecting the canal"; clearly indicating that the expression was regarded as relating to other nations than the United States. Other nations were to agree with the United States, under whose exclusive control the canal was to be built, to observe the rules adopted by the United States. In no other way, in fact, was an agreement conceivable. When this idea of agreement to observe the rules was elimi-

nated and the fact of observance was substituted therefor in the amendments "all nations observing these rules" and "such nations", two things were accomplished 1) Great Britain was placed on the same footing as other nations and 2) the objection of the United States was met against conferring upon *other nations* a contractual right to use the canal. So thought Lord Lansdowne and so Secretary Hay. No better evidence is to be had, that the provision "the canal shall be free and open to the vessels of commerce and of war of *all nations observing these rules* on terms of entire equality", does not embrace or relate to the United States; and that, therefore, neither rule 1, nor any of the other rules expresses any intention to restrict the powers of the United States as to granting a subsidy equal to the tolls, or refunding the tolls (as other nations may do), or as to granting a direct exemption, which is essentially the same thing; or as to imposing on her own ships exceptional burdens and onerous conditions not exacted of other nations — in a word, that the treaty was never intended expressly to restrict the power of the United States either in time of war or in time of peace to legislate

as to her own vessels of war or of commerce, coastwise or foreign, in any way she sees fit. This is a sane and reasonable conclusion and the only one that harmonizes with all the provisions of the treaty.

XII.

It remains to consider the British objection that the exemption of the vessels of war of the Republic of Panama from the payment of tolls increases the proportionate burden of all other nations for the upkeep of the canal to such an extent that it is made unjust and inequitable. This exemption is provided for in Article XIX of the treaty between the United States and Panama of November 18, 1903.

Aside from the fact that this entire doctrine of "identical tolls" is untenable, as we have seen, the Republic of Panama has paid a consideration in advance and once for all, the like of which no other nation can pay. There is certainly nothing in the Hay-Pauncefote treaty to restrict the United States to the acceptance of current dues in payment for the use of the canal; nor is the United States under any obligation to call a con-

ference of nations to pass upon the adequacy of the consideration paid by Panama.

Moreover, the tiny Central American republic had no vessels of war then, it has none now, nor is it likely that it ever will have any, for its independence is by the same treaty perpetually guaranteed by the United States. If it should ever peradventure launch out upon great wars of conquest, it may need a gunboat or two. Even then the relative difference in the rate of tolls which the exemption of the "navy" of Panama would make would be infinitesimal. A mighty nation which advances this as one of its principal arguments is apparently in sore straits for points; and the fact that it has waited for nine years to raise the objection does not strengthen the belief that the objection is made in confidence of its sufficiency.

It is deplorable that Great Britain has chosen just this time for bringing forward her protests and pretensions, when all nations are filled with admiration and enthusiasm because

the dream of centuries is about to be realized, the event which Goethe, with an almost miraculous vision, foresaw in 1827, and which he wished his life prolonged fifty years to see. Great Britain might have waited without sacrificing one iota of her alleged rights till the canal was in actual operation; or better still, she might have (and should have) made her pretensions known nine years ago when they were first so unwittingly disregarded. The persistent efforts of the British government, vigorously supported by transcontinental railway lines, to accomplish the repeal of the Act of August 24, 1912, have up to this time met only with rebuffs in and out of Congress. It is believed that the American nation will remain steadfast in the face of unwarranted demands, conscious of honorable motives as respects foreign powers, and firm in upholding her sovereign right to legislate as to her own property and her own subjects as she sees fit, in the execution of the great purposes she had in view in building and controlling the new waterway. If she retreats today, it will be all the harder for her to assert her just rights in the future.

As reflecting American sentiment, we quote

from an editorial in the *Outlook* of October 5, 1912, as follows:

"What is it that the United States has done? For nearly four hundred years the civilized world entertained the idea of a canal through the Isthmus from the Atlantic to the Pacific. Surveys were made, plans were drawn, treaties were enacted. Finally the French people undertook the work. They failed. The American people assumed the burden. They have fought disease and death. They have struggled with engineering problems incredibly difficult. They have laid upon themselves financially an everlasting burden of over four hundred million dollars. All this has been done not merely for their own benefit, but for the benefit of the entire world. And their final act is to say that the ships of all nations, including their own, engaged in international commerce shall share the benefits of the Canal on equal terms. Not only that, they have legally fixed for the ships of the British people (who are now accusing the Americans of dishonorable practices) a rate of toll which is actually insufficient to pay the cost of the maintenance of the Canal. Have they (the British) given us in this matter that

word of praise which we may be fairly said to deserve? If they have spoken such a word of praise, they certainly have not repeated it often enough to be in danger of over-stimulating our vanity."

By the President of the United States of America.

A PROCLAMATION.

I, *William Howard Taft*, President of the United States of America, by virtue of the power and authority vested in me by the Act of Congress, approved August twenty-fourth, nineteen hundred and twelve, to provide for the opening, maintenance, protection and operation of the Panama Canal and the sanitation and government of the Canal Zone, do hereby prescribe and proclaim the following rates of toll to be paid by vessels using the Panama Canal:

1. On merchant vessels carrying passengers or cargo one dollar and twenty cents ($1.20) per net vessel ton—each one hundred (100) cubic feet—of actual earning capacity.

2. On vessels in ballast without passengers or cargo forty (40) percent less than the rate of tolls for vessels with passengers or cargo.

3. Upon naval vessels, other than transports, colliers, hospital ships and supply ships, fifty (50) cents per displacement ton.

4. Upon army and navy transports, colliers, hospital ships and supply ships one dollar and twenty cents ($1.20) per net ton, the vessels to be measured by the same rules as are employed in determining the net tonnage of merchant vessels.

The Secretary of War will prepare and prescribe such rules for the measurement of vessels and such regulations as may be necessary and proper to carry this proclamation into full force and effect.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this thirteenth day of November in the year of our Lord one thousand nine hundred and twelve and of the independence of the United States the one hundred and thirty-seventh.

[SEAL]

WM H TAFT

By the President:

P C KNOX

Secretary of State.

By the President of the United States of America.

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[SEAL]

WM H TAFT

By the President:

P C KNOX

Secretary of State.